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INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	7
1. The Decision Below Is Plainly Correct	9
2. No Question of Importance Is Presented	12
CONCLUSION	15

AUTHORITIES CITED

CASES:

Allis-Chalmers Mfg. Co. v. *N.L.R.B.*, 261 F. 2d 613 (CA 7) 13
General Shoe Corporation, 77 NLRB 124 8
Gummed Products Company, 112 NLRB 1092 ..7, 8, 9, 10, 12
Kearney & Trecker Corp. v. *N.L.R.B.*, 210 F. 2d 852 (CA 7) 8
N.L.R.B. v. *A. J. Tower Co.*, 329 U. S. 324 .....13, 14
N.L.R.B. v. *Mattison Machine Works*, 274 F. 2d 347, cert. granted 363 U.S. 826 .....7, 13
N.L.R.B. v. *Waterman Steamship Co.*, 309 U. S. 206 ..13, 14
Universal Camera Corp. v. *N.L.R.B.*, 340 U. S. 474 14

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §141 *et seq.*

Sections 10(e) and 10(f) 10

MISCELLANEOUS:

Twenty-second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1957 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 382

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

CELANESE CORPORATION OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Court below was correct in denying enforcement of an order of the National Labor Relations Board requiring the Respondent to bargain with a union, where the Court rejected on the basis of insufficient evidence the Board's finding that the union represented a majority of the Respondent's employees.

2. Whether the Court below was correct in holding that a representation election, relied upon by the Board as the sole basis of its finding of majority representation by the union, was an invalid expression of employee choice where the union on the eve of the election circulated a letter to employees containing a material misrepresentation of fact.

STATEMENT OF THE CASE

Pursuant to a "Stipulation for Certification Upon Consent Election" approved on March 5, 1958 (JA 6), an election was held on March 12, 1958 (JA 6, 107) among the approximately forty-eight (48) employees in the bargaining unit at the Employer's plant (JA 111). Of the forty-seven (47) ballots cast, twenty-five (25) favored the Union and twenty-two (22) opposed the Union (JA 6). There were no void or challenged ballots (JA 6). A change in two (2) votes would have changed the results of the election.

The circumstances preceding the election which led to the Company's objections to the validity of the results involved a series of eleven (11) letters circulated by the Company to the employees, designed to review the facts concerning wages, fringe benefits, and working conditions of the employees.

In brief, these letters reviewed the Company's policy of maintaining full employment even during business dips by the use of outside contractors whose services could be eliminated during periods when production was reduced (JA 36-38); the disciplinary policies with respect to job security (JA 39-40); promotions through the posting of job opportunities (JA 41-43); the hospitalization and group insurance program, the cost of which was borne entirely by the Company (JA

43-44, 48-51, 51-54), and its retirement program (JA 43-44); the Company efforts to provide better working conditions and conveniences for its employees, including its financial assistance to a recreational club for employees (JA 43-44); its practice of avoiding lay-offs by assigning work to employees in jobs other than their primary ones (JA 45); its seniority policies and welder training program (JA 46-47); pay for jury duty, funeral leave, premium pay for second and third shifts, and two-and-a-half times pay for work performed on recognized holidays (JA 48-51); its wage program and wage rates (JA 48-51, 55-58).

Three of the Company's letters were devoted in whole or in part to the Company's group hospitalization, surgical, and life insurance programs (JA 43-44, 48-51, 51-54).

The Union distributed two letters to the employees (JA 59-63). The second letter (to which the Company objects) was dated March 10, 1958 (JA 61). It was delivered by hand to some 20 of the employees on March 10 (JA 92, 115) and was presumably received by the rest of the employees on March 11, the day before the election, since the remainder of the letters sent to the employees were deposited in the mail box near the plant at 6:30 P.M. on March 10 (JA 92, 115).

The letter claimed that the aforementioned "Celanese fringes" and "other plant conditions" had been won by the Union through collective bargaining (JA 61), stating in part:

> ". . . He [the plant manager] says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes,

> as well as other plant conditions, were won through collective bargaining, and in many instances over the initial opposition of the Company.
>
> "Mr. Pearson, the plant manager, does not know much about this, since many of the gains won by the Union for Celanese workers date back to a time when he was just a youngster . . ."

The Company was not informed of this letter until about 1:40 P.M. on March 11, 1958 (JA 92, 113), the day preceding the election. At this time, eight employees were not in the plant (JA 112). By 3:00 P.M.—one-and-one-half hours after the letter reached the Company—five additional employees, comprising the production day shift, had left the plant (JA 113). By 4:00 P.M. seventeen more employees, comprising the bulk of the maintenance and warehouse group, had completed their shifts (JA 113). By 6:00 P.M. only the regular shift of six people remained in the plant (JA 113). In short, by 4:00 P.M. 30 employees had left the plant for the day; by 6:00 P.M. the number had increased to 35 employees. None of the employees who had left the plant was scheduled to re-enter the plant before the day of the election, when the polls were scheduled to open at 6:30 A.M. (JA 113).[1]

The Company filed objections to the election, alleging that on the eve of the election the Union had circulated among the employees a letter which contained misrepresentations of fact on material issues involved in the election, thereby affecting the results, so that the tally of ballots did not comprise a true determination

[1] The trial examiner, whose decision and recommendations were adopted by the Board, conceded that ". . . the Respondent did not have sufficient time before the election to reply to the Union letter. . . ." (JA 92).

of the wishes of the employees with respect to representation by the Union (JA 4-5).

On April 7, 1958 the Regional Director of the Board issued a report on objections (JA 6-18). The report contained no findings of fact concerning the truth or falsity of the Union's assertions, but rather recommended that the Board overrule, without hearing, such objections on the ground that they did not raise "any material or substantial issue with respect to the results of the election" (JA 11).

The Company filed exceptions to the Regional Director's Report, together with a supporting brief and request for oral argument before the Board (JA 19-63). In support of its contention that the Union misrepresented the origin of employee benefits enumerated in the Company letters, the Company submitted in its brief[2] that it had provided for its employees unilaterally as a result of Company policy rather than collective bargaining a comprehensive retirement plan and a plan of group insurance covering hospital, surgical and polio expense benefits, life insurance, accidental death and dismemberment benefits, accident and sickness benefits (JA 27),[3] as well as other important fringes (JA 27, 28). It pointed out that such benefits were never "won through collective bargaining and in many instances over the initial opposition of the Company", as the

[2] Inasmuch as no hearing had been held on the issues raised by the Company, the only means whereby the Company could support its contention was through written argument to the Board and its representatives.

[3] The aforementioned benefits were enumerated in the letters sent by the Company on February 25, March 4 and March 6 (JA 43, 49, 51-54).

Union had erroneously claimed in its letter of March 10 (JA 28).

On August 6, 1958, without affording the Company any hearing and without any evidence (other than the Company's objections) before it, the Board denied the request for oral argument, overruled the Company's objections, and issued a certification that the Union was the majority representative of the employees (JA 64-72).

Thereafter, the Company declined to meet with the Union for the purposes of collective bargaining because it believed that the Union did not represent a majority of the employees in the stipulated unit (JA 75-76, 131-132).

Subsequently a complaint issued, eventuating in the determination by the Board that the Company had illegally refused to bargain with the Union. The opinion of the trial examiner, which was adopted *in toto* by the Board, rested on two grounds: that the disputed language of the union's letter to employees stated that *some* rather than *all* of the benefits granted by the Company were the result of collective bargaining with the union;[1] that even if the letter were to claim credit for all benefits so granted, that such a falsehood amounted merely to a harmless "half-truth" which did

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[1] The Board's Petition for certiorari misstates in one respect the Respondent's position in the initial representation case. The reference (p. 6) that "it was undisputed that *some* of the benefits mentioned in the Company's letters were obtained through collective bargaining at the Company's other plants" [original emphasis] is misleading, for without conceding that identical benefits were negotiated at other plants, the Company merely drew to the Board's attention the fact that the establishment of the group insurance program was plainly independent of benefits existing at other plants.

not affect the results of the election. Although the trial examiner conceded that Respondent did not have sufficient time before the election to reply to the allegations of the union's letter (JA 92), he dismissed its import by averring that the series of Company letters theretofore distributed had implicitly claimed that the Company established such benefits (JA 92, 93).

ARGUMENT

The suggestion that this case presents any issue which justifies a petition by the Government for a writ of certiorari is without foundation. The only question before the Court of Appeals was factual, and no strained analogy to the *Mattison*[5] decision can transform a routine application of a familiar legal rule to a particular set of facts into an issue which would warrant review of the instant case by this Court. In fact the Petition does not refer to any of the grounds enumerated in Rule 19(b) for granting a writ of certiorari. The absence of any such express reference is significant, for an analysis of the matter reveals that no such ground exists.

Conceivably an issue of importance might be presented in a case where a court of appeals in reversing the Board, did so because it disapproved of a recognized regulation or rule of decision adopted by that agency to govern the elections of employee representatives. It is plain that this is not the situation here. Far from disapproving of a Board rule, the Court below accepted as applicable law the doctrine the Board itself enunciated in the *Gummed Products* case, 112 NLRB 1092, and described in a recent Annual Report (JA 29) as follows:

[5] *N.L.R.B.* v. *Mattison Machine Works*, 274 F. 2d 347, *cert. granted* 363 U.S. 826, No. 74 this term.

> "... when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party cannot learn about them in time to point out the errors to the employees and the employees do not have independent knowledge which will enable them properly to evaluate the misstatements, the Board will set aside the election ..." (See pages 54-55 of the Twenty-second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1957.)

This very principle is alluded to in the Petition (p. 7) as a recognized exception to the Board's more general policy against policing the the truth or falsity of campaign propaganda. What the Court did was to examine the evidence which presumably constituted the basis of the Board's finding (or assumption) that no material misrepresentation affecting the results of the election had been made, and to conclude that because of the absence of support in the record as a whole for such a finding, the Board erred in failing to apply its own rule.

Particularly noteworthy in this context is the following paragraph of the Court's opinion:

> "This court does not agree with the holding of the Board. The content of the Union's communication to the employees and the manner of its distribution go beyond the bounds of 'legitimate' propaganda'. These activities fall below the standards to be observed in representation elections *as set forth by the Board and as approved by the courts.* (Emphasis supplied.) See *The Gummed Products Company*, 112 NLRB 1092; *The Matter of General Shoe Corp.*, 77 NLRB 124, and *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 210 F. 2d 852 (7th Cir. 1954)."

In the *Gummed Products* case, where the Board stated the rule that a factual misrepresentation made by one of the parties will vitiate an election if uttered at a time when it could neither be evaluated or rebutted, the Board said, 112 NLRB at 1093:

> "The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in the election."

1. The Decision Below Is Plainly Correct

As one of the two grounds of its holding, the Board construed the language of the Union's letter, quoted *supra*, as claiming credit for *some* rather than *all* fringe benefits, and said that the claim so construed was true. To read the letter in such a way, of course, necessitates the arbitrary insertion of the word "some" before the words "Celanese fringes, as well as other plant conditions, were won through collective bargaining . . .". There was no evidence in the record to show that the writer of the Union letter in any other document or speech to the employees ever conveyed so limited a claim. Moreover, it is obvious that the propaganda value of this last minute attempt to discredit the Company would have been lost had the Union taken so modest a position.

The Court, in the absence of any evidence to support the qualified meaning the Board had read into the Union's claim, held contrary to the Board that "the challenged statement cannot reasonably be construed to refer to less than 'all' Celanese fringes". As the record indisputably established that the major fringe benefits like the systemwide group health insurance and pension plans had been unilaterally established by

the Company, the Court held that the Union's representation was both false and material.

Unless some rule of law renders even the most fanciful reading by the Board of a document intended to be understood by factory employees, immune from judicial review, the Court's finding that the Union letter did constitute "a misrepresentation of fact, the falsity of which was known to the Union" was not only correct, but obviously within the province of a reviewing court under Section 10(e) and (f) of the National Labor Relations Act.

With respect to the secondary ground relied on by the Board—that the Union's false statements to employees would not vitiate an election under the application of the *Gummed Products* doctrine—the Court disagreed with the Board's novel contention that, although the falsehoods were concededly circulated at a time when no reply was possible, the Company had rebutted such contentions through its series of letters *previously* sent to the employees. The Court, noting the trial examiner's concession that the Company did not have sufficient time to reply to the allegations, found no evidence to support the view that *prior* Company letters had apprised the employees of the fallacies of the Union's claim.

Moreover, the Union was a party to the collective bargaining alluded to in its letters—thus satisfying the *Gummed Products* criterion of a party with special knowledge of the actual facts. Hence there was no basis for the Board, acting on its own rule, to believe that the employees were not misled through reliance on the Union's assertions, and the Court, on the record before it, had no alternative but to set aside this finding.

Thus the Court, far from failing "to inquire whether there was reasonable basis for the Board's conclusion that the error, if any, did not mislead the employees" (Pet., p. 10) made an express holding on this point.[6] In so holding, the Court relied entirely on the inferences to be drawn from the Board's own standards, for the Board's decision turned on the validity of either the finding (a) that the Union letter contained *no* material misrepresentation, or (b) that the employees would *not* give particular weight to the misrepresentation because its source [i.e., the Union] had *no* special knowledge of the true facts. The Board apparently concedes at page 7 of its Petition here that these are the determinative facts, and that had the Board answered these factual questions in the affirmative, it, like the Court below, would have vitiated the election.

It is highly inaccurate, therefore, to characterize the decision of the Court below as standing for the proposition "that a Board representation election must automatically be set aside whenever it appears that the union in the closing moments of the campaign has made a false or exaggerated claim" (Pet., pp. 9-10).

The text of the opinion (Pet., 17-22) shows that the Court inquired far more exhaustively into the issues than did either the Board or the trial examiner. For example, it considered one point concerning which no agency finding whatsoever was made, viz., whether or not the sentence in the Company's final letter, quoted in the petition (p. 4), was tantamount to a claim on the part of the Company that no fringe benefit in any

[6] "Under the facts of this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots . . . ." (Pet., p. 22).

of its plants had been obtained by collective bargaining. In his brief and argument in the circuit court, Board counsel advanced this contention as a justification for the Union's closing broadside. Despite the absence of any Board finding on this question, the Court inquired into this aspect of the matter, but after reading the entire letter rejected this argument on the ground that—

> ". . . The claim in the Company's final letter that certain changes were made because of individual progress rather than as a result of a union demand refers to changes in wages discussed immediately preceding this statement. Clearly, the Company was attempting to convey the impression that the employees were enjoying existing benefits and working conditions without present Union representation at the Point Pleasant plant, while the Union points out that these gains have been derived as a result of prior Union activities." (Pet., p. 21)

2. No Question of Importance Is Presented

Although studiously avoiding any reference to Rule 19(b), the Board in its Petition, referring to the fact that it conducts thousands of elections each year, contends that it is "important to the overall administration of the Act that the decision below be reviewed" (Pet., pp. 13-14). In view of the fact that the *Gummed Products* rule, or indeed any general rule covering the conduct of elections is not in issue here, it is difficult to understand how the question presented to the Court below assumes general importance.

The propaganda engaged in by unions and employers in employee election campaigns is usually tailor-made for the problems of the particular plant or industry and for the real or assumed receptivity of the workers

employed there to particular lines of argument. Indeed, except for the *Allis-Chalmers* case,[7] the Board Petition cites no administrative or judicial proceeding which bears any close resemblance to the case at bar.

The Board's reference to *N.L.R.B.* v. *Mattison Machine Works*, 274 F. 2d 347 (CA 7), *cert. granted* 363 U.S. 826, No. 74, has no applicability to the instant case. The *Mattison* decision involved the evaluation by the Board of the effect on an election of a clerical error made by Board personnel which resulted in the misstatement of the employer's name on the notices of election and ballots. The Court rejected the Board's policy determination that such a technical oversight, under the particular circumstances, was not sufficient to void the election.

It is clear that the holding in that case involves no dispute between the Court and the Board concerning the substantial evidence rule, but rather the question of whether judicial decisions regarding misprinted ballots in public elections should govern. In the instant case, the Court merely refused to permit the Board to apply its rule in a manner inconsistent with the undisputed evidence of record. The Board's suggestion that this Court grant certiorari and combine this case for hearing with *Mattison*, or defer ruling on its petition until disposition of *Mattison*, is unjustifiable in view of the fact that the two cases lack a common issue. Indeed, such a disposition of this petition would be prejudicial to the respondent.

The Board's emphasis on dicta by this Court (Pet., p. 11) in *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, and *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U.S.

[7] *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 261 F. 2d 613 (CA 7).

206, is misplaced here. The *A. J. Tower* case dealt with the legitimacy of a published Board regulation concerning election procedure, viz., waiver of objections to a voter's eligibility where the party raising objections had failed to challenge the ballot at the appropriate time. The quotation from *Waterman*[8] merely affirmed the propriety of Board action in deferring action on an election petition filed by one union until the company ceased its discriminatory practices against a rival union.

It can scarcely be said that this Court's approval of rules adopted by the Board to deal with those problems in any way restricts judicial review of the factual findings of the Board on which the Board relies in applying its rule in a particular case. Whatever latitude may be accorded the Board as an expert body in establishing rules governing election procedures, nothing in the statute endows the Board with any unreviewable authority to make findings of fact. In this latter area, the Board is required to base its findings on substantial evidence on the record as a whole, and its failure to do so may be corrected by the Circuit Court of Appeals upon review.

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[8] Much of the general language in the *Waterman* opinion cannot be taken at face value today in view of subsequent amendments enlarging the scope of judicial review. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, at 477-478.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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